



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1306 OF 2013

RICHARD MUCHAI KIBATHI.....PLAINTIFF

=VERSUS=

FRANCIS NGIGE MATATHIA.....1ST DEFENDANT

HIRAM BERE KINUTHIA.....2ND DEFENDANT

RULING

1. This is the notice of motion dated 11th April 2016 brought under Section 1A, 1B, 3A and 63 of the Civil Procedure Act and Section 13(7) (g), 19(1) and 2 of the Environment and Land Court Act No. 19 of 2011, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of law.

2. It seeks:-

1. Spent.

2. That a mandatory injunction do issue to compel the plaintiff to demolish all structures, fences, building materials and all deposits and/or temporary structures placed on the land known as LR NO. 14702/31 and LR No. 14702/32 at his own expense.

3. That a restorative injunction be granted to restore the parcel of land known as 14702/31 and 14702/32 to the status quo prior to the unlawful invasion.

4. That a permanent injunction do issue to restrain the plaintiff, his servants, employees, and/or agents or whomsoever from trespassing onto the land, taking possession, alienating, disposing or interfering with the 1st defendant's right of ownership in any manner pending the hearing and determination of the suit.

5. That in the event of non-compliance with (1), (2) or (3) the applicant together with the government planning and environment department be granted the powers to proceed with the demolition.

6. That the costs of this application be in the cause.

3. The application is supported by the affidavit of Elizabeth Wanjiru Ngige the co-administrator of the estate of Francis Ngige Matathia, sworn on the 11th April 2016.

4. It appears the application is not opposed.

5. On the 6th December 2016, the court directed that the application be canvassed by way of written submissions.

6. It is the 1st defendant's /applicant's submissions that the plaintiff/respondent is in contempt of lawful authority shown by his disobedience of enforcement order issued by the Director of Physical Planning Compliance and Enforcement of the County Government of Nairobi. He is a non repentant trespasser seeking to steal a match.

7. She has put forward the cases of **Locabail International Finance vs Agroexport & 2 Others [1986] 1ALL ER; Kenya Breweries Ltd**

vs Okeyo [2002] IEA 109; Kamau Muchuha vs The Ripples Ltd [1990-1998] EA 388.

8. Under Order 40 Rule 1 and 2, the court can give injunctive relief where it is shown that the property in dispute is in danger of being wasted, damaged or alienated by any party to the suit or wrongly sold in exclusion of a decree and imposes terms for breach. She prays that the application be allowed with costs.

9. I have considered the notice of motion dated 11th April 2016, the affidavit in support, the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

10. I have gone through the affidavit in support of Elizabeth Wanjiru Ngige. In paragraph 12, she depones thus:

“That on 8th April 2015, the plaintiff was served with an enforcement notice to stop further illegal development forthwith and to remove the illegal structures. A copy of the said notice is annexed hereto and marked “EWN 5”.

I have seen the said notice, it does not state that the owner or developer is the plaintiff. The same is inclusive.

11. The 1st defendant/applicant has not demonstrated that the plaintiff entered into the land and put up structures. The 1st defendant/applicant has failed to put up a case for issuance of a mandatory injunction. In the case of **Locabail International Finance vs Angloexport & 2 Others [1986] 1 All ER 901**. It was held thus:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff”

In the instant case, there are no special circumstances to warrant the grant of a mandatory injunction.

I note that the application has been pending for over four (4) years. It would be in the interest of justice if the hearing is expedited so that the issues can be resolved once and for all.

12. In conclusion, I find no merit in this application and the same is dismissed. I make no orders as to costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant